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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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APPENDIX A.

Section 5(b) of the Clayton Act, 15 U. S. C. Sect. 16(b):

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. Oct. 15, 1914, c. 323, § 5, 38 Stat. 731; July 7, 1955, c. 283, § 2, 69 Stat. 283.

APPENDIX B

Opinion of Lane, U.S.D.J. (September 19, 1966)

In the United States District Court
for the District of New Jersey
State of New Jersey, et al., Plaintiffs,
v.
Morton Salt Company, Defendants
Civil Action No. 687-65

The Court: Gentlemen, we are dealing today with five motions. The first is Defendant International's motion for partial summary judgment. The second is Plaintiff New Jersey's motion to amend the complaint and in the alternative to file responsive pleading to allege fraudulent concealment. The third is a motion of Defendants Winans Carter Corporation and Winans Reliance Corporation and C. G. Winans Company for partial summary judgment. The fourth is Defendant Charles Schaefer Sons, Inc. for partial summary judgment with the same cutoff date, October 21, 1961, as Winans contends for. The fifth is the motion of National Oil & Supply Company for partial summary judgment with a cutoff date somewhat subsequent to the one urged by Winans because National Oil & Supply Company was not brought into the case by the amended complaint of plaintiff but rather brought in by an intervening plaintiff at some subsequent time.

The original complaint in this case was filed by the State of New Jersey on June 28, 1965, and that date is exactly four years from the date that an indictment was returned in the Federal criminal action in the United States District Court in Minnesota, filed or returned on June 28, 1961. In that Federal action, in the civil action brought by the Federal Government a few weeks after the indictment was returned, Morton, Diamond and International were defendants. Also, Morton, International and Diamond were defendants in the original complaint filed by New Jersey on June 28, 1965. When that original complaint was filed in this court, there was no timely service of it, and the summons that was to accompany the complaint. Rather, the State of New Jersey advised the Clerk

of the Court and the Office of the United States Marshal here not to effect service at that time, requesting that no action be taken regarding the service of process until further advice from the plaintiff was had.

Now, that original complaint filed by the State of New Jersey on June 28, 1965, would appear to be almost an exact copy of a complaint filed by the City of Philadelphia against the same six defendants, I think, that appeared in the original complaint filed here by the State of New Jersey. They are Morton, Pioneer, Salt Service, Incorporated, International, Cayuga, Diamond Crystal. This City of Philadelphia complaint was filed on 7-1-63, roughly two years before the New Jersey complaint was filed in this court.

Now, I have compared these two complaints, the City of Philadelphia and the State of New Jersey, and find they differ only as to the designation of the plaintiff, the City of Philadelphia, of course, substituting the State of New Jersey.

Paragraph 2 of the Pennsylvania action is omitted because it identifies the City of Philadelphia, and paragraph 4. Eastern District of Pennsylvania is changed to District of New Jersey, and a new paragraph 3 of the New Jersey complaint. Is there an additional sixth defendant in the Philadelphia case? I thought they were the same. Are they not the same?

Mr. Van Dusen: I think so.

The Court: I thought I checked them off, but I had five and I see there are six.

Mr. Ryan: There are six, your Honor.

The Court: I could check that very quickly.

Mr. Ryan: Cayuga, Salt Service, Pioneer, Diamond International—

The Court: Yes, they are the same parties. Six, there are six. They are identical parties.

As we go on paragraph by paragraph, we have an exact copy of paragraphs of the Philadelphia complaint. We come to paragraph 15 and there is a recital at the end, "Including the City of Philadelpia and the State of Pennsylvania," and in our paragraph 14 of this complaint they change to "Including the State of New Jersey."

Paragraph 17, City of Philadelphia, again State of Pennsylvania is changed to New Jersey. And damages in paragraph 23 of the Philadelphia suit are in the sum of $655,-701.51. In the New Jersey complaint, damages asked are a more modest amount, I think of $100,000, and they are the sum total of changes that I find in these two complaints.

So the State of New Jersey on the very last day of the four-year period subsequent to the filing of the United States Government action in Minnesota filed with this Court what is in all respects an exact copy of the City of Philadelphia suit against the same defendants, the Philadelphia suit having been filed two years prior.

Now, a notice of motion was filed by Defendant International to dismiss the original complaint, filed by the Plaintiff New Jersey for lack of prosecution and failure to abide by the rules of service and process, and International filed this motion October 15, 1965, made it returnable on November 1, 1965. It was adjourned to November 15, and subsequently adjourned to December 6, 1965.

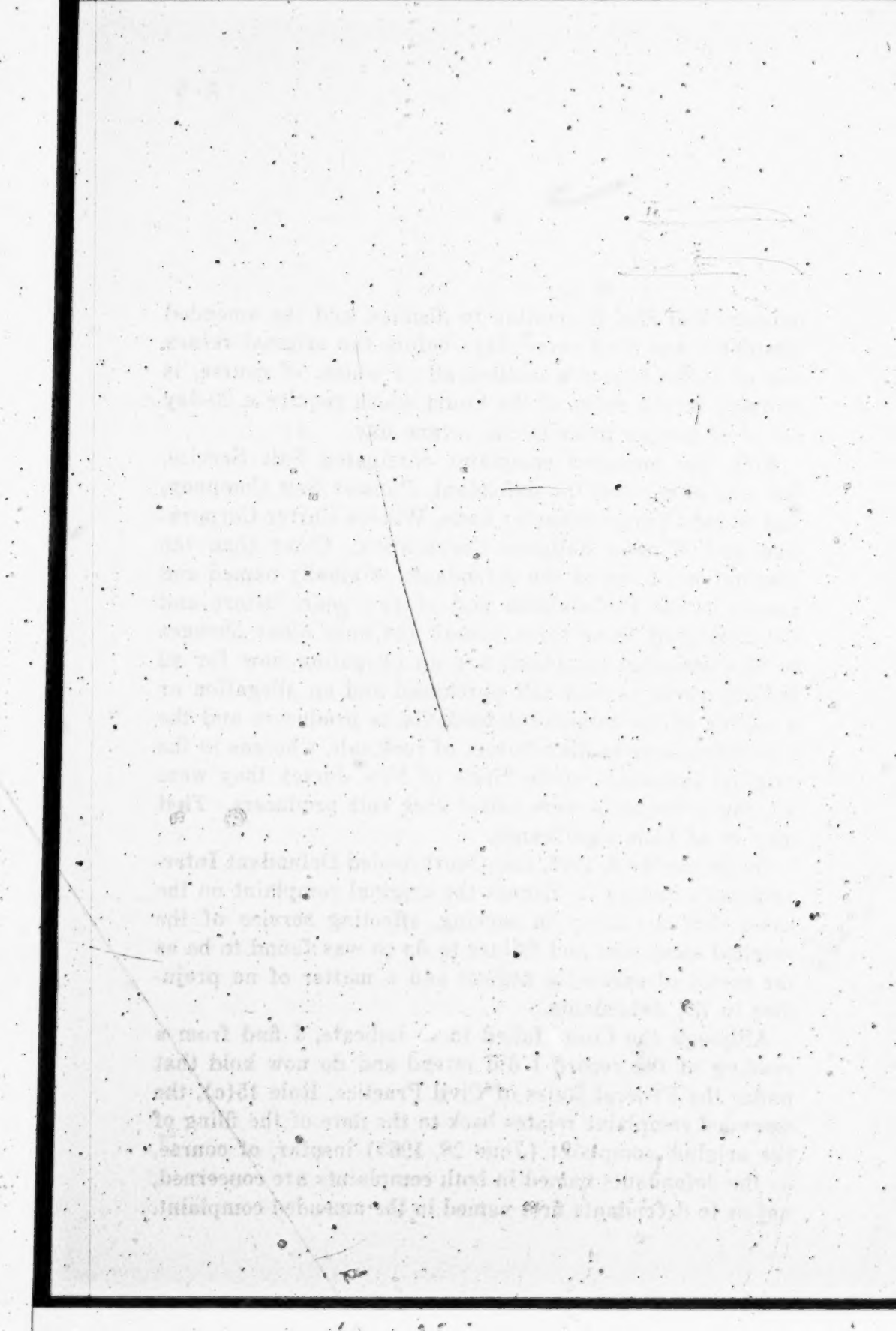
New Jersey responded by filing an amended complaint on October 25, 1965, and the service of this complaint was effected forthwith. This amended complaint of the State of New Jersey was filed ten days after Defendant Inter-

national had filed its motion to dismiss, and the amended complaint was filed seven days before the original return day of International's motion, all of which, of course, is contrary to the rules of the Court which require a 20-day notice of motion prior to the return day.

Now, the amended complaint eliminated Salt Service, Inc. and eliminated the defendant, Pioneer Salt Company, and added Charles Schaefer Sons, Winans Carter Corporation and Winans Reliance Corporation. Other than the elimination of two of the defendants originally named and named in the Philadelphia suit of two years before and the adding of these three names, the only other changes in this amended complaint are an allegation now for $2 million worth of rock salt purchased and an allegation or a calling of the retained defendants as producers and the new defendants as distributors of rock salt, whereas in the original complaint of the State of New Jersey they were all, the defendants were called rock salt producers. That may be of little significance.

On December 6, 1965, this Court denied Defendant International's motion to dismiss the original complaint on the basis that the delay in serving, effecting service of the original complaint and failure to do so was found to be as the result of excusable neglect and a matter of no prejudice to the defendants.

Although the Court failed to so indicate, I find from a reading of the record I did intend and do now hold that under the Federal Rules of Civil Practice, Rule 15(c), the amended complaint relates back to the date of the filing of the original complaint (June 28, 1965) insofar, of course, as the defendants named in both complaints are concerned, not as to defendants first named in the amended complaint.



In the conclusions given from the bench on December 6, 1965, it was observed that the plaintiff, New Jersey, did not intend to indefinitely delay service of the original complaint, but rather the delay was the result of excusable uncertainty and confusion in the Attorney General's Office, and that the four-month delay between June and October 1965 was not in itself reason to dismiss the original complaint, particularly since prejudice did not result from the delay.

During the several intervening months since the filing of the amended complaint, numerous answers have been filed, and arguments heard in court on various motions. As a result, the issue of the Statute of Limitations has been raised in pleadings and arguments approximately 30 times. Indeed, it would appear to the Court that the issue of the Statute of Limitations was the underlying reason why plaintiff, State of New Jersey, apparently copied a complaint files two years before in Philadelphia and filed it in this court on June 28, 1965, exactly four years after the return of the United States indictment returned in the District of Minnesota.

A notice of motion for a partial summary judgment was filed by Defendant International on June 29, 1966, made returnable July 26, 1966, adjourned to August 4, 1966. The purpose of this motion was to effect, that is to have this Court rule that any recovery by Plaintiff New Jersey against International be limited to a period subsequent to June 28, 1961, or four years prior to the date of the filing of the original complaint in this court.

International based its right to such relief on the grounds that a four-year statute of limitations pertains to any claim which plaintiff might have against it.

The applicable statute of limitations is 15 U. S. C. Section 16(b), which reads as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceedings shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

International argues that the Statute of Limitations had not been tolled as to it by the pendency of a civil action by the United States against International, Morton, Diamond and others filed in the District Court of Minnesota on July 11, 1961, because International had entered into a decree for a consent judgment in that suit on September 18, 1963, effective by its terms, I believe, January 5, 1964, and International argues Plaintiff New Jersey had not filed its suit in this court within one year subsequent to International's departure from or termination in the United States civil action in Minnesota, that is on its departure on September 18, 1963.

Now, International's motion for partial summary judgment was made returnable on July 26, 1966, thirteen months subsequent to Plaintiff New Jersey's original complaint and nine months subsequent to Plaintiff New Jersey's amended complaint.

Plaintiff New Jersey again responded to International's move by filing on July 28, 1966, a motion seeking permission to again amend its complaint or in the alternative to file a responsive pleading so as to include an allegation of fraudulent concealment of the conspiracy.

Obviously the motion to amend, if granted, would defeat International's motion for partial summary judgment based on the June 28, 1961, cut-off date.

In keeping with its practice throughout the course of this litigation, plaintiff, in filing its motion, failed to comply with the rules of this court. Its motion was filed only seven days before its return date, which was made to coincide with the date to which Defendant International's motion had been adjourned, August 4, 1966.

Thus, the motion for the right to amend was filed by Plaintiff State of New Jersey nine months subsequent to the filing of its amended complaint and thirteen months subsequent to its original complaint.

On August 4, 1966, when argument was had on International's motion for partial summary judgment, counsel for Plaintiff New Jersey conceded that its complaint had not been filed within the one-year period following International's termination in the Rock Sale anti-trust suit filed by the United States Government in Minnesota in 1961 and argued for the right to amend and thus avoid the effect of the four-year statute of limitations by allegations and

later proof of defendants' fraudulent concealment of their alleged conspiracy.

However, the concession made by plaintiff was made prior to plaintiff's learning of the decision handed down by Judge Larson of the United States District Court for the District of Minnesota on July 28, 1966.

At page 19 of Judge Larson's decision, in summary he states that he has determined:

> "1. That the date which governs the commencement of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is June 28, 1961."

I think I should note, of course, that this memorandum decision was handed down in the cases of the State of Michigan, and all Related Cases Pending in the District of Minnesota, versus Morton Salt, International, and others that appear in this case.

> "2. That the date which governs the termination of the tolling of the statute of limitations under Section 5(b) of the Clayton Act is October 25, 1966."

That is a date which we have not as yet arrived at.

> "3. That Section 5(b) of the Clayton Act applies to all defendants named in these treble damage actions.
>
> "4. That all plaintiffs, including intervenors and members of a class, are entitled to the benefits of Section 5(b).
>
> "5. That the matters complained of in these treble damage actions are based in whole or in part on

the Government litigation within the meaning of Section 5(b)."

If Judge Larson's rulings were to be followed by this Court, all pending motions for partial summary judgment would be denied without regard to plaintiff's proposed amendment. This is so because Judge Larson has held that October 25, 1966, is the date governing the tolling of the Statute of Limitations.

However, the issue of termination resulting from one of several defendants entering into a consent decree prior to the conclusion of Government proceeding against other defendants in an anti-trust suit has been litigated in this District Court for the District of New Jersey in the case of Gordon v. Loew's, Inc., 147 F. Supp. 398, affirmed 247 F. 2d 451 (3rd Cir. 1957).

In this case Judge Wortendyke at page 413, having discussed the Leonia Amusement case, which was heard in New York, Southern District of New York, stated as follows:

> "The moving defendant points out that it has been judicially determined that United States v. Paramount Pictures terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in that litigation. Grengs v. Twentieth Century-Fox Film Corp., 7 Cir., 1956, 232 F. 2d 325, certiorari denied 352 U. S. 871, 77 S. Ct. 96. In accordance with Section 16 of Title 15 U. S. C. A., the New Jersey six-year statute of limitations began to run against the plaintiff herein on November 8, 1948.

"Inasmuch as this action was commenced on March 3, 1955, all claims which accrued to plaintiff prior to March 4, 1949, are barred by the New Jersey Statute of Limitations. To that extent, the motion of RKO for summary judgment will be granted."

Now the history prior to the Gordon case is that in 1938 the Government had brought a civil action against various exhibitors or distributors in the movie industry. The litigation continued until 1952. However, Defendant RKO then entered into a consent decree on November 8, 1948, and in the Loew case the complaint was initiated on March 3, 1955, and one of the defendants there, RKO, moved for summary judgment on the ground of the Statute of Limitations, and Judge Wortendyke of this district, applying the six-year New Jersey statute, held the Government action terminated as to RKO on November 8, 1948, the date upon which the defendant entered into a consent decree in the litigation.

On appeal, the Third Circuit held the applicable New Jersey Statute of Limitations was two years rather than six years, and thus did not touch on the question of when the Government action against RKO ceased to pend.

Now, other courts have reached the same conclusion the District Court of New Jersey reached in the Gordon v. Loew's Incorporated. In an appeal from the dismissal of the complaint because of the Statute of Limitations, it was held in Grengs v. Twentieth Century-Fox Film Corporation, 232 F. 2d 325, Seventh Circuit, certiorari denied 352 U. S. 871, 77 Supreme Court 96, and I quote:

"These decrees became final on appeal within two years prior to the filing of the suit at bar. Hence

> this action was not barred by the statute of limitations, except as to defendants RKO Radio Pictures Incorporated and Paramount Film Distributing Corporation. The latter two defendants entered into consent decrees on November 8, 1948 and March 3, 1949, antedating the commencement of this action by more than two years. As to them the order and summary judgment of the district court is affirmed."

A similar conclusion was reached in Manny v. Warner Bros. Pictures, 116 F. Supp. 807, Southern District of California, 1953, wherein the Court stated, at 809:

> "In the case at bar the consent decree as against Paramount was entered on March 3, 1949, and the action was terminated upon the entering of the decree. It would seem unjust to say to Paramount after such a consent decree had been entered and the action terminated as to them that the statute of limitations did not commence to run at that particular time but would be postponed until some future date when judgments were obtained and became final against all of the other defendants."

In Sun Theatre Corp. v. RKO Radio Pictures, Inc., 213 F. 2d 284, Seventh Circuit, it was stated at 292:

> "Plaintiff's position is twofold. Thus we must determine, 1. whether the Paramount case continued to pend against these defendants, thus tolling the statute of limitations as to them, until the cause was determined as to all defendants, notwithstanding the prior entry of the consent decrees; and 2. wheth-

er, if the consent decrees are held to be final, that action was nevertheless pending against said defendants within the meaning of Section 5 in view of the various orders entered subsequently thereto modifying those decrees in certain respects.

"The first contention has been urged and rejected by the courts in at least three well considered decisions by district courts. Barnett v. Warner Bros. Pictures Distributing Corp., D. C., 112 F. Supp. 5; Alex Theatre Corp. v. Balaban & Katz Corp., CCH 1952 Trade Cases, Par. 67,357; Manny v. Warner Bros. Pictures, Inc., D. C., 116 F. Supp. 807. In the Barnett case the court said of the consent decrees against these defendants in U. S. v. Paramount, 'It is the opinion of the court that the pendency of a government suit ends (1) when final judgment has been entered after trial and appellate proceedings are concluded, or (2) when final judgment is entered by consent of the parties. Any other construction of Section 5 would lead to long, and in some instances permanent suspensions of all statutes of limitations. Congress could not have intended such a result.' 112 F. Supp. at page 7."

In addition, at page 292, the Court said:

"The consent decrees against the RKO and the Paramount defendants were essentially final in character. From the date of their entry the complaints of the government against the respective defendants were terminated. At that time the purpose of the tolling provisions had been served, and, logically,

> the statute of limitations commenced to run. To hold that the statute is tolled as to all defendants in a government suit until that suit is terminated as to every defendant would result only in placing a premium on dilatoriness and stale litigation."

See also the cases cited by Judge Wortendyke in the Gordone case, particularly Leonia Amusement Corporation v. Loew's, Inc., 117 F. Supp. 747, where it was held the defense of the statute of limitations was tolled as to all defendants that were parties to the Paramount suit, but considered separately, each defendant, determining when the Government action as to that defendant ceased to pend. See also Tague v. Balaban, 146 F. Supp. 356 (Northern District of Illinois 1956).

Again, in Sun Theatres Corp. v. RKO Radio Pictures, Inc., a case cited above at 213 F. 2d 284, the Court was called upon to determine whether consent decrees against two of several defendants, entered more than two years before commencement of the damage case, had terminated the action as to them. In sustaining the defense of the statute of limitations, the Court held, at 293, 294:

> "Plaintiff's reliance on modifying orders entered subsequent to entry of these consent decrees to support its contention that the Paramount case continued to pend against RKO and the Paramount defendants after decrees were entered as to them is, we think, misplaced.
>
> "The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement.

> "We conclude that the two year statute of limitations, although suspended originally as to RKO and the Paramount defendants by the pendency of U. S. v. Paramount, began to run in favor of these against them in that case on November 8, 1948 and defendants when consent decrees were entered March 3, 1949, respectively. Plaintiff's claim is now barred."

Again, at page 293 the Court stated:

> "If we should adopt the rule for which plaintiff contends, pendency of the Paramount case as to consenting defendants would be coextensive with the power of the court to enforce its decree, encompassing an indefinite period of time with no foreseeable limits. So construed, Section 5 might, as defendants suggest, suspend the running of statutes of limitations forever. The mere statement of this proposition illustrates its fallacy. Had Congress intended to deny the benefit of limitation statutes to violators of the antitrust laws, that intention would have been clearly expressed. If we cannot imply that general intent, we should not presume that Congress intended that limitations be forever suspended as to the wrongdoer who is caught while the violator who evades detection may invoke their protection. The court's decree of injunction is no less final merely because from time to time expediting orders are necessary to effect its enforcement."

In the present case, International's consent decree would seem to have become binding when it was entered on No-

vember 3, 1963. After that date, as between the Government and International, there were no longer any issues left for adjudication.

Gentlemen, by comity and tradition, brother judges of a multiple-judge district court customarily follow a previous decision of a brother judge upon the same question, except in unusual and exceptional circumstances or unless required by higher authority to do otherwise.

In re Petition of Marko Jerzick, 153 F. Supp. 651, 653 (Western District of Pennsylvania 1957) and U. S. v. Jannuzzi, 22 FRD 223 (District of Delaware 1958).

And it is my intention to follow Judge Wortendyke's decision in the Gordon case.

Thus, applying that decision to the pleadings in their present posture, I must necessarly hold Defendant International terminated its participation in the Government's Minneapolis suit in the fall of 1963, and therefore Plaintiff New Jersey's complaint was filed more than a year subsequent to such termination, and that it therefore follows that the four-year statute of limitations is applicable to International and it is entitled to the granting of its motion unless plaintiff is granted the right to amend its complaint to plead fraudulent concealment.

As to Defendants Winans Carter Corporation, Winans Reliance Corporation and C. G. Winans Company, Defendant Charles Schaefer Sons, Inc. and Defendant National Oil and Supply Company, these defendants were not parties to the United States Government's Minnesota action, and they were not made parties to the original complaint filed by Plaintiff New Jersey on June 28, 1963.

Defendants Winans and Schaefer were first made parties by plaintiff upon the filing of the amended complaint on

October 23, 1965. Defendant National Oil & Supply was brought in subsequently by an intervening plaintiff.

Thus it would appear that these defendants are entitled to the granting of their motions for partial summary judgmenting, restricting damages to the four-year period immediately preceding their respectively being brought into the litigation as parties defendant.

In New Jersey Wood Finishing Company v. Minnesota Mining and Manufacturing, a like fact situation was ruled upon by Judge Augelli of this court, and as pointed out in full in the brief of Winans filed in support of its motion, Judge Augelli ruled:

"The complaint be and the same hereby is dismissed with prejudice as against the defendant Essex Wire Corp. with respect to plaintiff's claim for relief against that defendant for violation of Section 7 of the Clayton Act," on the basis that Essex Wire had not been made a party defendant in a Government anti-trust suit.

And then in an additional paragraph he provides:

> "Plaintiff is given leave to amend the complaint as against defendant Essex Wire Corp. to allege with the requisite particularity overt acts in violation of the Sherman Act committed with four years immediately preceding the filing of the complaint in this matter."

Also, several of the cases I have discussed were set out in the brief of International in support of its motion and cover this very point about non-defendant companies, non-defendants in Government suits not being subject to suspension of the Statute of Limitations, provision 5(b).

Again, Judge Larson has ruled that Section 5(b) may be applied to non-Government defendants—to defendants who were "too low in the conspiracy" to be included as named defendants, or even named co-conspirators in the Government suit.

However, the precedent handed down by Judge Augelli is to be followed here, and defendants' motions will be granted, again subject to whatever action is taken in regard to the plaintiff's motion for right to amend its complaint.

Should higher authority adopt in whole or in part the conclusions that Judge Larson has reached, appropriate relief may be granted by this C[illegible]rt by way of adjustment of any limitation that may be now imposed so as to then conform to the then law of the case.

Now we turn to a consideration of the merits of plaintiff's motion to amend to include the allegations of fraudulent concealment.

Rule 15(a) provides leave to amend "shall be freely given when justice so requires."

Paragraph 21 of the proposed amendment reads as follows:

> "The aforesaid combination and conspiracy necessitated frequent communications among defendants and the co-conspirator companies. These communications were made under the cover of legitimate trade practices. As a result of said communications and other acts done by defendants and the co-conspirator companies for the purpose of actively and fraudulently concealing the existence of the aforesaid combination and conspiracy, plaintiff and inter-

venor plaintiffs neither had knowledge, nor by the exercise of reasonable diligence could they have learned, of the existence of such combination and conspiracy until they first became aware of the government proceedings in July 1961, as hereinafter set forth in Paragraph 22 of this Amended Complaint."

As was clearly stated during the argument had on August 4, the Court is not to determine at this point whether proof of fraudulent concealment has or has not been presented. Rather the determination is as to whether or not "justice requires" that the plaintiff be allowed to amend the complaint as proposed.

In considering that issue, it might be well to state a few definitions of the term "fraudulent concealment."

In the Philadelphia Electric Company cases tried by Judge Lord of the Eastern District of Pennsylvania, in giving instructions on plaintiff's burden to establish fraudulent concealment, he states:

"Now, I mentioned to you that the second prong of the defense was the statute of limitations . . . .

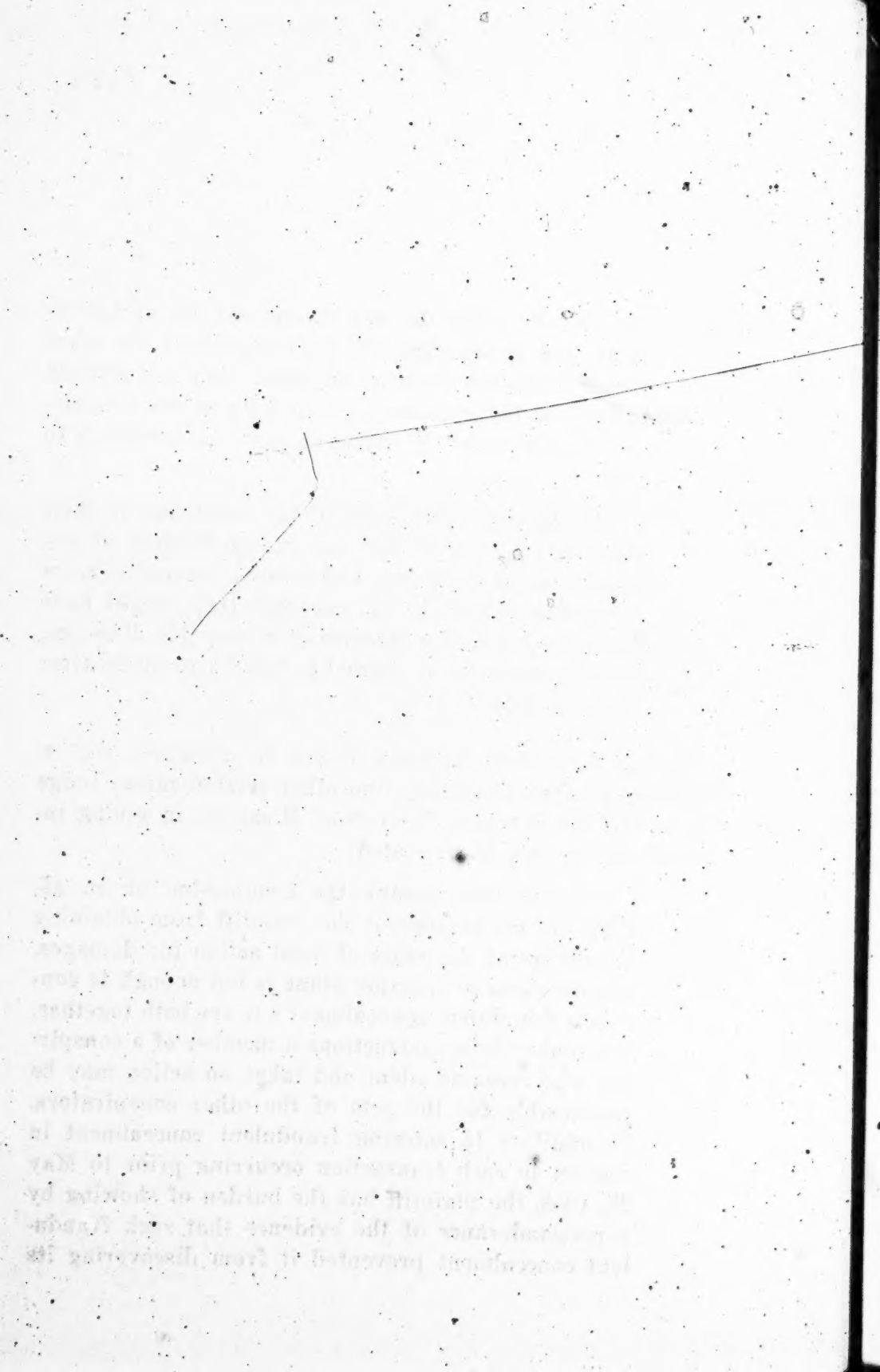
"This is a valid defense unless the defendants here fraudulently and effectively concealed any conspiratorial activities in which they were engaged. If you find that a conspiracy existed and that the plaintiffs were unable to discover the existence of that conspiracy, that the defendants took affrmative steps to conceal their part in the conspiracy and that these steps were successful, then the defendants are

not free to raise the bar of the statute of limitations, and if the plaintiffs have sustained the other elements of their burden of proof, they are entitled to recover for purchases for as long as the conspiracy existed under the evidence here; namely, back to 1946.

"If the plaintiffs knew of the existence of their cause of action or if they had reason to know of any agreement or collusion, and having reason to know or having reason to believe that they would have discovered it in the exercise of reasonable diligence, then the recovery is limited to purchases made after May 25, 1956."

In the Northwest Electric Power Cooperative, Inc. v. Moloney Electric Company, and other related cases, Judge Becker of the Western District of Missouri, in giving instructions on this issue stated:

"Concealment means the commission of an affirmative act to prevent the plaintiff from obtaining knowledge of the cause of legal action for damages. Silence alone or inaction alone is not enough to constitute fraudulent concealment nor are both together. But under these instructions a member of a conspiracy who remains silent and takes no action may be responsible for the acts of the other conspirators. In addition to showing fraudulent concealment in respect to each transaction occurring prior to May 25, 1956, the plaintiff has the burden of showing by a preponderance of the evidence that such fraudulent concealment prevented it from discovering its



cause of legal action for damages. And that by the exercise of reasonable diligence it could not have discovered its cause of legal action for damages in respect to the transaction in question . . . ."

Again, in the City of Burlington, Vermont, and others, v. Westinghouse Electric Corporation, an electric equipment conspiracy case, Judge Sirica of the District of Columbia, again instructing on plaintiff's burden to establish fraudulent concealment, stated as follows:

> "The exception to the normal operation of the statute of limitations to which I have referred, and upon which plaintiff relies, is known as the doctrine of fraudulent concealment. Simply stated, the doctrine of fraudulent concealment is this: That because of affirmative actions taken by the defendants to conceal their activities, if any, in violation of the antitrust laws the plaintiff claims that it did not know and could not, by the exercise of due diligence, have learned enough about the existence of such activities to be put on notice that it may have had a claim against defendants so as to permit plaintiff to bring suit upon that claim within the period normally allowed by the statute of limitations."

Now, in the light of those definitive assertions, I intend to talk now on the proofs submitted by both sides on the motion for the right to amend.

Defendant International has submitted a letter dated March 21, 1960, written by Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey, to the

Division of Antitrust, Department of Justice, in which he states:

"Dear Sir:

"The State of New Jersey has been receiving identical bids from various concerns for the supplying of rock salt. We have been informed that your office is currently investigating the submission of identical bids to federal agencies for the supplying of rock sale.

"We should appreciate very much receiving any information which you may have with respect to this problem. Specifically, we should like to know the concerns who are being investigated, the statuts of the investigation and the persons or branches of government in charge of this investigation."

Further, a clipping from the New York Times of August 5, 1960, entitled, "Rock Salt Inquiry Broadened by U. S.

"Special to The New York Times.

"The Justice Department has broadened an inquiry into allegations of price-fixing on the rock salt that is used to melt ice on the nation's streets and highways.

"The anti-trust division has requested data from forty cities, including New York, and from an unspecified number of state agencies, including the Port of New York Authority, it became known today.

"The data are to be presented to a Federal grand jury, now in recess," and so on and so forth.

Then, also, there appears a Trenton date of August 4 in that same clipping.

> "New Jersey will receive bids Aug. 16 on 21,000 tons of rock salt for ice control. Charles F. Sullivan, State Director of Purchase and Property, said today he hoped the bids would produce competition. Last year only three identical bids were submitted."

Then a clipping of the Newark Evening News in their edition of August 17, 1960, entitled "Economy Move. "State Eyes Rock Salt Substitute," and it says under AP Trenton byline:

> "Charles F. Sullivan, New Jersey director of purchase and property, is going to find out if a substitute for rock salt can be used to clear snow and ice from state highways.
>
> "The division received five bids yesterday on a contract to supply the state with 21,000 tons of rock salt.
>
> "Sullivan said four firms based their offers on a price of $8.40 a ton at the mine, plus shipping costs. But he said one firm submitted a much lower price for a synthetic material which it manufactures. The firm is the Monroe Co. of Cliffwood.
>
> "May Test Material
>
> "The offer will be studied by his division and the State Highway department as rapidly as possible, Sullivan said, and the material may be tested. He said it must be determined if the material can be

transported and stockpiled easily, if it will work in the department's salt spreaders, if it will damage road surfaces, and if it is as effective as salt.

"Favorable reports might cause the division to throw out all the bids received yesterday, change the specifications in the contract and advertise for new bids, Sullivan said.

"Sullivan has been trying for more than a year to bring about what he considers competitive bidding on rock salt and to break through the prevailing price.

" 'As far as the sources of supply are concerned, we got no competition,' he commented of the bids yesterday."

A further clipping from the Newark Evening News dated September 2, 1960, under a heading, "Salt Price Action Due.

"State Seeking to Break Industry's Policy of No Competition.

"Trenton (UPI)—Gov. Meyner will confer with state officials Sept. 13 in an attempt to break the fixed price policy of the rock salt and calcium chloride industry.

"Charles F. Sullivan, state director of purchase and property, announced yesterday that six identical $116,051 bids had been received for supplying 2,970 tons of calcium chloride.

"Calcium chloride is mixed with rock salt to speed up the melting properties of rock salt in very cold

weather. The Highway Department spreads the mixture on roads.

"Earlier the state received two identical $589,444 bids for supplying 21,985 tons of rock salt for coming winter needs.

"Sullivan, State Treasurer John F. Kervick and Highways Commissioner Dwight R. G. Palmer will confer with the governor on the problem, Kervick said.

"'We may try to take steps to break up the fixed bidding,' Kervick said.

"A federal grand jury sitting in Chicago has launched a national investigation of prices in the rock salt industry."

Then a further clipping taken from the Trentonian, a publication here in the State Capitol dated September 14, 1960, under the heading, "State Will Fight Salt, Chloride Price Fixing," and it reads:

"The state decided yesterday to go to court in an attempt to break up fixed-price bidding by rock salt and calcium chloride suppliers.

"Gov. Meyner made the decision in a private conference with Purchase and Property Director Charles F. Sullivan, Highway Commissioner Dwight R. G. Palmer and State Treasurer John A. Kervick.

"The State recently received six identical bids of $116,051 for supplying 2,970 tons of calcium chloride,

which is mixed with rock salt to trigger the latter's ice-melting ability in cold weather.

"Earlier, the state received two identical $389,444 bids for supplying 21,985 tons of rock salt.

"Kervick said award of the contracts will be held up until the attorney general can initiate legal action.

"Sullivan said New England states bought rock salt for $5.40 a ton (at-mine-rate) last year from the same companies that charged New Jersey $8.40 a ton.

"Kervick explained the state will have to award contracts before winter sets in, because the contracts represent the state's entire year's purchase of highway ice-melting chemicals. But he said the price could be open to revision if the state gets court relief.

"The bidders who were awarded last year's contracts in fixed-price bidding are among the identical bidders this year, Kervick said. These bidders are suppliers, but 'the price is fixed at the source of supply, which prevents competitive bidding', Sullivan said recently.

"Kervick said the attorney general will decide whether New Jersey will join in a federal court action already under way in Chicago or will initiate its own suit under state laws."

Then there is a letter from the State of New Jersey signed by Burrell Ives Humphreys, Deputy Attorney Gen-

eral, written to Honorable Robert A. Bicks, Acting Assistant Attorney General, United States Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, in which he talks about bids submitted by Charles Schaeffer & Sons of Elizabeth, G. C. Winans Company of Newark, American Oil and Supply, information which he apparently received from the Essex Board of Freeholds, and again says:

> "Will you please tell me the present status of the Grand Jury investigation into rock salt and what future developments we may expect."

That is dated October 2, 1960.

Then there is attached to these other proofs a form sent out by the Antitrust Division from the United States Court House, Chicago 4, Illinois, dated May 10, 1960. This form was submitted to the Purchasing Division of the New Jersey Highway Authority, and it is termed, "Survey Relating to Rock Salt Purchases by State, County and Municipal Agencies."

It asks, among other things, or it has set out in here the dollar value and quantity of rock salt purchased for each of the years during the period 1957 through 1959. It asks with respect to each instance in which identical bids were received, "state any facts or circumstance which tend to support the conclusion that the identical bids received resulted from collusion among the bidders," and other similar inquiries.

This document is some six or seven pages long.

There was also included in this proof submitted by International, Defendant International, a letter dated March

13, 1958, signed by William L. Brach, Chairman, Central Purchasing Committee, City Council, the City of East Orange, New Jersey, which was addressed to the Honorable Victor R. Hansen, Assistant Attorney General, Anti-Trust Division, Department of Justice:

> "I have been directed, on behalf of the East Orange City Council, to call to your attention the following facts on bids for Rock Salt received by The City of East Orange over the past three years. A schedule of said bids is attached hereto.
>
> "It would appear to us, on the face of it, that there is no competition among the respective bidders as the field has been limited to two bidders whose bids match to the penny.
>
> "We are convinced that we are not obtaining the benefits of competition in this area and surmise that the experience of other municipalities is similar to ours.
>
> "We would appreciate your advice as to whether action under the anti-trust laws has been initiated or is contemplated."

A letter dated April 27, 1960, written by Victor R. Fischer, Treasurer, Department of Purchase, Town Hall, West Orange, New Jersey, to Earl A. Jinkinson, Esp., Chief, Midwest Office, Antitrust Division, Chicago 4:

> "Dear Sir:
>
> "Enclosed please find prepared questionnaire which you requested in your letter of April 13, 1960, in regard to Grand Jury Investigation of Possible Antitrust Violations in Sale of Rock Salt."

That covers most of the proofs submitted by the defendant.

The State of New Jersey in answer to that type of proof has submitted an affidavit of Burrell Ives Humphreys, Deputy Attorney General of the State of New Jersey between the years 1959 and 1962. He is now in private practice.

Paragraph 3 says:

> "When I first became involved in matters concerning identical bidding I came into possession of a file in the office of the Criminal Investigation Section dating back to 1955 wherein there was data indicating identical bids had been submitted from bidders for the supplying of various commodities for State use, including rock salt. The data indicated that submitting of uniform bids for rock salt had been a continuing practice.
>
> "4. From 1959 through 1961, I received considerable data concerning identical bids for rock salt. Also during that period our office was in contact with the United States Department of Justice, Antitrust Division, and we supplied this agency with data on identical bids.
>
> "5. Although we made numerous efforts to obtain information from various sources concerning the reason for the high incidence of identical bids for rock salt, we were unsuccessful in developing information upon which in my opinion we could predicate a successful legal action for conspiracy to fix prices.

"6. On April 28, 1960, I drafted an extensive memorandum concerning, *inter alia*, federal antitrust violations and conspiracies to violate the Federal Antitrust Law by fixing prices. In that memorandum I indicated to Attorney General David D. Furman, through the Director of Criminal Investigation Section, that we did not know of any agency arrangement made among the rock salt bidders; nor how the identical prices were reached; and that in my opinion we did not at that time have adequate proof of a conspiratorial agreement in violation of the antitrust laws. Accordingly I recommended against litigation at that time. My recommendation was followed. During 1960 and 1961 we continued to accumulate information concerning identical bidding but without being able to develop information upon which to base a suit under the antitrust statutes."

He talks about during 1960 receiving information from the New Jersey Turnpike Authority and the New Jersey Highway Authority, copies of reports to the United States Department of Justice Antitrust Division, copies of which are attached hereto. He makes reference in Paragraph 8 to the September 14, 1960, issue of "The Trentonian," and he says:

"I have also been advised that the defendants in the above-entitled suit are relying upon this news release as evidence of the State's knowledge of a conspiratorial arrangement in the rock salt industry. Information contained in the file indicates that no such order was issued and that the newspaper

article was incorrect in that regard. To the best of my recollection, the State at the time of the publication of said newspaper article possessed no more information concerning any collusive agreement in violation of the antitrust laws with respect to rock salt beyond that of identical bids with which the Attorney General's office had already been familiar for some time.

"9. On July 6, 1961, the Criminal Investigation Section of the Attorney General's office received a newspaper clipping from the 'Philadelphia Inquirer' dated June 29, 1961, referring to an indictment by a Federal grand jury of 'four of the nation's leading salt companies.' Subsequently, on July 14, 1961, I received a letter dated July 12, 1961, from the United States Department of Justice advising me 'that on June 28, 1961 a federal grand jury sitting at Minneapolis Minnesota, returned a True Bill' "

against Morton, International Salt, and others for unlawful conspiracy.

He says that the Attorney General's files revealed no copies of these newspaper articles. He was unable to comment upon them without having them available.

He believes there is nothing in the office that would indicate such articles were called to the attention of the Attorney General or brought to the State's attention over and above what was already in its possession, and that the Attorney General did not at any time while he was in office order any investigation to be undertaken with respect to collusive bidding in the rock salt industry in vio-

lation of the antitrust statutes beyond the accumulation of bidding information and cooperation with other governmental bodies.

Then he includes or attaches to his affidavit a letter dated June 7, 1960, from the Garden State Parkway by D. Louis Tonti, Executive Director, a letter of transmittal forwarding the information he had sent to the Antitrust Division of the Federal Government. There is a list of vendors to whom bids were forwarded from 1955 to that date. It has bid opening dates, first bid, bid made, and so forth. It is Turnpike information given to the Antitrust Division showing the history of bidding by various companies in New Jersey.

There is a letter dated October 21, 1960, written by the Port of New York Authority by Sidney Goldstein to Hon. David R. Furman, Attorney General, which says:

> "In accordance with my telephone conversation with you the other day, I have forwarded to the U. S. Assistant Attorney General, in charge of antitrust, information on bids received by the Port Authority for rock salt, in connection with the Justice Department's investigation of rock salt prices. A copy of my letter together with a tabulation of bids received by the Port Authority is enclosed.
>
> "If you should wish any further information, I will, of course, be happy to furnish it."

Then there is a copy of a letter written by Sidney Goldstein to the Hon. Robert A. Bicks, Assistant Attorney General, dated October 21, 1960, concerning Rock Salt Bids, et cetera. That would appear to be the most pertinent of the proofs.

In addition to that, the State of New Jersey has filed a copy of the deposition of Edward L. Fuller, who is and has been the President of International Salt Company, defendant, since 1931. I have carefully gone through this deposition, and it contains nothing of affirmative value, as I see it, in regard to fraudulent concealment. As a matter of fact, I think the State offers it in sort of a negative way to show Mr. Fuller knew nothing and hence how could the State of New Jersey be expected to know about this.

In Philco Corporation v. Radio Corporation of America, 186 F. Supp. 155 (1960), it is stated:

> "Philco, through its top officials, was thus informed of the very facts which it then recognized as constituting a 'tortious interference in Philco's contract negotiations and a violation of the anti-trust laws,' (page 31 of plaintiffs' brief),"

—I am not sure what that is—

> "and which they now allege as the very claim for relief which was concealed from them. We emphasize the point that they were not given facts which create suspicion or indicate the possibility of a claim for relief based upon the antitrust laws. Rather they were given the essential facts now constituting their claim for relief (minus only the fact of injury to the public and to themselves). And they recognized them as constituting a cause of action at that time. The knowledge of such facts constituted knowledge of the cause of action now claimed to have been concealed. Such knowledge negates the existence of an element essential to the defense of concealment."

Also, in Kansas City, Missouri v. Federal Pacific Electric Co., 310 F. 2d 271 (1962), I quote:

> " 'To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.'
>
> • • •
>
> " ' • • • we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.' " 88 U. S. at pp. 349, 350.

The State of New Jersey in its brief cites Kansas City, Missouri v. Federal Pacific Co., 310 F. 2d 271 (8th Cir. 1962), and in a quotation from that case it appears:

> "In summary, we hold that the fraudulent concealment doctrine is to be read into the statute of limitations so that under circumstances here allegedly present, the limitation period begins to run from the time that plaintiff by the exercise of reasonable

diligence, discovers or should have discovered the cause of action."

Further, in that brief they cite the landmark case of Bailey v. Glover, 88 U. S. 342, 22 L. Ed. 614 (1874).

"that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' "

Gentlemen, I have carefully weighed the proofs before me and all that I have talked about today, and I am compelled to the conclusion that there has been negligence, laches on the part of the plaintiff, New Jersey, in this case. The claim of collusion, of violation of the antitrust law was open and notorious certainly in 1960. Claims of this nature from reputable people, and statements appeared in various newspapers throughout the eastern seaboard, and it seems to me that New Jersey very clearly on the proofs before me—and I am not determining whether or not there was fraudulent concealment—but on the proofs before me has been negligent, guilty of laches in not proceeding to investigate further and further as to all the publicity, and this knowledge called for it to do so,—and not proceeding forthwith and filing a suit in this court, not on the last day of the four-year period but rather much sooner and including all the allegations that it might have, includ-

ing the one asked for now of fraudulent concealment long before this original suit was filed.

On that basis it is my determination in the interest of justice that I am required to deny the petition or request of the State of New Jersey for the right to amend to include the allegation of fraudulent concealment.

Mr. Ryan: Do I understand correctly, then, your action in denying this motion also results in the granting of our motion for partial summary judgment?

The Court: Yes, sir. After the granting of that motion, subject to anything on appeal, but subject more particularly to any subsequent adjudication of Judge Larson's holdings, because if his holdings, any one or more or all become the law of this case, then I would expect the application to be made before me for an adjustment in accordance with whatever the law may then be as to the periods of damages provable.

Mr. Brochin: Your Honor, of course interrogatories have been submitted to the local defendants by the plaintiff and intervenors. May we assume that the period as to which answers must be supplied in answer to those interrogatories now is shortened to the period limited by the partial summary judgment?

The Court: No, I think not. I think we must be much broader and continue to be by way of discovery for matters of proof that may seem cumbersome to you but may lead up to actual proof of the four-year, damage occurring, if any, during the four-year period I have indicated. It may be before we are finished with this case it will be much greater than four years. I think we ought to have broad inquiry, still.

Mr. Brochin: Since I raised this right off the top of my head, I hope that your Honor's comments won't preclude us from moving to suppress particular interrogatories which we may think would be relevant only to damages if the damages were allowable prior to the four-year period.

The Court: I couldn't lay out some offhand rule now that would cover all contingencies. You are not barred from moving here, there and elsewhere where you think you should.

Mr. Lichtenstein: Do you want an order presented with regard to your decision?

The Court: I certainly do.

Mr. Lichtenstein: Circulated and consented to by all counsel prior to being submitted to you?

The Court: Yes, sir.

Mr. Gold, I assure you and your associates that there is no intent on my part to be critical of you or any of your associates personally. I think this is long-range neglect by plaintiff. I know that you have been assigned a thousand duties, not just the rock salt duties. I intend nothing along those lines at all, and it is hardly necessary for me to state so, but I want it clear on the record.

Gentlemen, anything further?

(Discussion off the record.)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16397 16517
16398 16518
16399 16519

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

AND

COUNTY OF BERGEN, A BODY POLITIC AND CORPORATE OF THE STATE OF NEW JERSEY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY HIGHWAY AUTHORITY,
Intervening Plaintiff-Appellant,

AND

NEW JERSEY TURNPIKE AUTHORITY,
Intervening Plaintiff-Appellant,

v.

MORTON SALT COMPANY, AN ILLINOIS CORP., ET AL.,
Defendants-Appellees.

ON APPEALS FROM INTERLOCUTORY ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 17, 1967

Before HASTIE, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 8, 1967)

SEITZ, *Circuit Judge.*

On June 28, 1965, the State of New Jersey instituted in the district court a private antitrust class action against seven corporations seeking treble damages and other appropriate relief because of their alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1 and 2). Several parties were permitted to intervene as plaintiffs. The district court thereafter granted the partial summary judgment motions of certain defendants based on the applicable statute of limitations.[1] Plaintiffs were granted leave to appeal those judgments and this is the decision thereon.

On July 11, 1961, the United States of America instituted a civil antitrust action in the Federal District Court of Minnesota (hereafter "Minnesota case"). Only one of the appellees here, International Salt Company ("International"), was a named defendant therein. The defendants in the Minnesota action were charged with a continuing combination and conspiracy to restrain trade in interstate commerce in rock salt in violation of Section 1 of the Sherman Act and to fix prices and to submit collusive bids to governmental agencies and corporations in connection with the sale of rock salt. A consent decree was entered against International on November 4, 1963. On November 24, 1964, judgments on the merits were entered in that action against other defendants, including defendants in this case who are not appellees. Those judgments were affirmed by the Supreme Court of the United States on October 25, 1965. Morton Salt Company v. The United States, 382 U. S. 44 (1965).

In 1966, the present appellees, International, Winans Carter Corp., Winans Reliance Corp., C. G. Winans Co., Chas. Schaefer Sons, Inc., National Oil & Supply Co., and Cayuga Rock Salt Company, successfully moved for partial summary judgment in this action in the district court

1. Claims accruing more than four years prior to the filing of the complaint are barred.

on the basis of the statute of limitations (15 U. S. C. § 15b), which provides that any action to enforce a claim of the present type is barred unless commenced within four years after the cause of action accrued.

With respect to the appellees other than International the district court concluded that the tolling statute, 15 U. S. C. § 16(b), had no application to them because they were not named as defendants or conspirators in the Government's Minnesota action. The appellants challenge the correctness of that interpretation. In reaching its conclusion that the statute applied only to named parties to the Government proceedings, the district court relied upon a decision of the New Jersey district court to that effect incorporated in an order in the case of New Jersey Wood Finishing Co. v. Minnesota Mining & Manufacturing. The order was apparently not appealed. In the present case the district court felt that it should adhere to the prior ruling in its district. However, it also relied upon cases elsewhere to the same effect.

We turn to the tolling statute. Section 16(b) provides:

> "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not incuding an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

It is clear from the undisputed facts that if the quoted tolling provision was applicable to all the appellees, the summary judgments were erroneously entered here. We say this because § 16(b) tolls the statute during the pendency of Government proceedings and for one year thereafter. This action was, of course, commenced even before the termination of the Minnesota case. We address ourselves then to the question as to whether the statute of limitations was tolled as to such appellees.

We note immediately that Section 16(b) does not contain any language limiting its application on the basis of the identity of the defendants in the Government's antitrust action. Rather it is directed, to the extent indicated, to the preservation of "every private right of action," against the operation of the statute of limitations. And so Section 16(b) does not explicitly limit its operative effect to named parties or conspirators. That the absence of circumscribing language may have resulted from a deliberate Congressional intent is indicated by contrasting Section 16(b) with Section 16(a).[2] Section 16(a), dealing with the use of judgments or decrees obtained by the Government, explicitly limits their use to the defendants against whom they are obtained. We recognize that due process requires that Section 16(a) operate only against parties. But we think the language also suggests that had Congress intended to similarly limit the operation of Section 16(b), it had before it language appropriate to that end.

In pursuit of the proper interpretation of the tolling statute, we turn next to an examination of the Congres-

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2. "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

sional purpose behind the enactment of the statute authorizing private antitrust actions. See Burnett v. N. Y. Central Railroad Co., 380 U. S. 424 (1965). In this way we gain a "feel" for the appropriate approach to the problem of construing the tolling statute. Of course, limitation statutes reflect the view that society as well as potential defendants have an interest in repose from litigation. But that factor may be outweighed when the implementation of some important Congressional purpose is involved. We think such a purpose is particularly apparent here. As the United States Supreme Court said in Minnesota Mining v. New Jersey Wood Finishing Co., 381 U. S. 311, (1965), when considering this very section, Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. See also Leh v. General Petroleum Corp., 382 U. S. 54 (1965); and see Bruce's Juices v. American Can Co., 330 U. S. 743 (1947).

The Congressional history, as reflected in the Minnesota Mining case, gives further support to the view that the tolling provision was enacted for the benefit of private parties who were injured. This factor plus Congressional policy suggest most strongly that the tolling provision, if of doubtful meaning, should be interpreted in a way which will permit a determination on their merits of private claims in this area.

Certainly a purpose behind the tolling provision was to afford the private litigant, as against defendants in a Government action, the benefit under restricted conditions of a judgment or decree obtained by the Government. But Leh and Minnesota Mining make it clear that at least an equally important purpose behind the enactment of Section 16(b) was to permit private claimants to obtain the benefit of the evidence and legal rulings involved in the Government's action. If the tolling provision is not for the benefit of private individuals who have been damaged by the activities of entities which are not named in the Government

action, that Congressional purpose will be in part frustrated. It could well mean that causes of action against purely private defendants would be barred even before the Government's action had progressed to the point where a legal or evidentiary basis for drawing a complaint against others could be established. We take notice that by their nature the processing of antitrust cases often takes years.

We think the following language from Leh, at 63-64 of the United States Reports, makes clear that 16(b) is not limited to named defendants in the Government's action:

> "* * * so here we cannot conclude that a private claimant may invoke § 5(b)[16(b)] only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. * * *"
>
> "* * * In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained."
>
> "* * * Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."

But the appellees who were not named in the Minnesota case argue that it would be unfair to apply the tolling statute to them. They say that parties in their position might not even know of the Government's action. They point out that the lapse of time without notice may prejudice their ability to defend a later private antitrust action.

because they may have destroyed their records. There is a certain appeal to this argument. However, there are important ameliorative considerations. The Government decree or judgment cannot be used against them. Moreover, the tolling statute, by its provisions, will only apply if there is a substantial identity between the matters alleged in the Government's action and those alleged in the private action. Leh v. General Petroleum Corp., above. Thus, while it is true that by virtue of the operation of the tolling statute there may be a certain staleness to the claims, it is also true that the "substantial identity" requirement of the statute gives some assurance that the defendant in the private litigation who is not named in the Government action may reasonably be expected to have an awareness of the Government proceedings. Otherwise the private plaintiff probably will not be able to comply with the requirement that there be a "substantial identity" between the actions. On such a premise, and in such a context, it may fairly be said that the position of a purely private defendant is substantially the same as that of a defendant in the Government action, as to whom the tolling provision is admittedly applicable.

We conclude that Section 16(b) of the statute applies to these defendant-appellees even though they were not defendants in the Government action. See State of Michigan v. Morton Salt, 259 F. Supp. 35 (D. C. Minn. 1966) where the District Court of Minnesota held that Section 16(b) applied to parties who were not named defendants in the Government action.[3]

We next consider the contention of the appellee, International, that the tolling of the statute of limitations ceased when the consent decree was entered against it, even though

3. Although the Morton Salt case was appealed, the particular issues here decided were not among the matters raised by the appeal. See Hardy Salt Co. v. State of Illinois, 377 F.2d 768 (8th Cir., 1967); cert. denied October 23, 1967, 36 Law Week 3168. See also State of Vermont v. Cayuga Rock Salt Co., decided Oct. 17, 1967, appeal pending in the Court of Appeals for the First Circuit, where the Maine district court followed the Minnesota district court's opinion as to the applicability of 16(b) to parties who were not defendants in the Government action.

the action continued against the other defendants. The district court so held in reliance upon an earlier New Jersey District Court opinion to that effect in Gordon v. Loew's, Inc., 147 F. Supp. 398 (1956). We should add that that judgment was affirmed by this court on appeal, but on different grounds. See 247 F.2d 451 (3rd Cir. 1957). The district court also relied upon the leading case of Sun Theatre Corp. v. R. K. O., 213 F.2d 284 (7th Cir. 1954), which reached the same conclusion. We conclude that Gordon v. Loew's, Inc., above, and the line of cases of which Sun Theatre case is representative, were based upon an interpretation of Section 16 which was destroyed by the quoted analysis made by the United States Supreme Court in the Leh case. The Minnesota Mining opinion also supports our evaluation of the statute.

Much of the reasoning set forth in support of our conclusion with respect to the applicability of the tolling provision to the purely private defendants is also applicable to International in its "consent decree" status in the Government action. Additionally, if the tolling provision ceased to apply to a party in International's position, such a litigant could probably thereby frustrate to some extent the statutory scheme by perhaps depriving private litigants of its assumed benefits. It could do this by agreeing to the entry of a consent judgment before any testimony was adduced. In such a situation the consent decree could not even be used against it in a private action. In addition, the potential private litigants would be faced with the possibility of having to commence suit before testimony was taken or legal principles established which might be of benefit to them.

It is also noteworthy that a named defendant in a Government action has less ground for complaint that the staleness of the claim may work to its prejudice than does a purely private defendant. The Government defendant is on explicit notice of the Government's claim and can take action to preserve its evidence. Finally, our conclusion

does not particularly discourage the settlement of Government litigation. We say this because Section 16(a), does not permit the use in private litigation of consent judgments or decrees obtained in Government actions if they are entered before testimony is taken. And, of course, they are only usable against parties to the Government action.

We therefore conclude that Section 16(b) tolled the statute as against International until the Government's Minnesota case was completed even though a consent decree was entered against International several years earlier. See State of Michigan v. Morton Salt, above.

In view of our decision we do not reach other issues raised by the parties.

The judgments of the district court will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C.

Correspondence on Consent-Decree Procedures Between Assistant Attorney General Donald F. Turner and Representative Emanuel Celler (D-NY)

March 2, 1967

Honorable Donald F. Turner
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C.

Dear Mr. Turner:

In its February 27, 1967 decision in the *El Paso* case (*Cascade Natural Gas Corp. v. El Paso Natural Gas Co., et al.*, and related cases), the Supreme Court underscored a deficiency in the procedures that are currently utilized by the Department of Justice in its antitrust consent decree program.

As you know, in the 85th Congress, the House Antitrust Subcommittee conducted an intensive investigation into the antitrust consent decree program of the Department of Justice. In its report, issued January 30, 1959, the Subcommittee, among other changes, recommended that the Department of Justice adopt procedures that would facilitate intervention by private parties in litigation over consent remedies in antitrust cases. The report of the Antitrust Subcommittee stated:

> "Revision of consent decree procedures of the Department of Justice, as the Committee recommends, should provide notice to the public of the terms of the consent decree, and establish a waiting period after there has

been agreement between the Government and the defendant. During the waiting period, private parties, who may be affected by the terms of the decree, *should be given an opportunity to intervene in the Government's case* in order to present their objections to the court for its consideration.

"When the Department of Justice presents a consent decree to the court for its approval, it should be accompanied by a statement that sets forth the facts involved, the defendant's position, the meaning of the provisions used in the decree, and the reasons that form the basis for the Department's acceptance of the particular compromise. The necessity to make such a statement should go far to insure against arbitrary action in the consent disposition of antitrust litigation." (emphasis supplied)

In view of the Supreme Court's positive affirmance in the *El Paso* case, that an applicant may intervene as of right when his property interests are not adequately represented, I believe it would be appropriate for the Antitrust Division to consider, at this time, revision of its Consent Judgment Policy, as promulgated in Order 246-61, June 21, 1961, so as to give effect to the above recommendations of the House Antitrust Subcommittee. "Incorporation of these recommendations in the Department of Justice Consent Judgment Policy would go far to minimize the settlement procedures that led to the Supreme Court's criticism in the *El Paso* case.

Sincerely yours,

.....

Emanuel Celler

Chairman"

March 17, 1967

Honorable Emanuel Celler
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

This is in response to your letter of March 2, suggesting that in light of the *El Paso* decision the Antitrust Division should revise its consent judgment policy (1) by acquiescing in formal intervention by third parties in Government civil cases in order to permit them to present objections to Government negotiated decrees; and (2) by filing a statement with every consent decree, setting forth among other things the facts and "the reasons that formed the basis for the Department's acceptance of the particular compromise."

Before commenting more directly on these proposals, I would like to review the historical background, the reasons which lead to the adoption of the Consent Judgment Policy promulgated on June 21, 1961, and the reasons why we have thought it appropriate to continue to abide by that policy. The adoption of the policy was attributable in large part to the report of your Subcommittee dated January 30, 1959. As noted in your letter, the report recommended revision of the consent decree procedures in order to provide a waiting period after public notice in order that possible objections to a particular consent decree could be publicly aired. The principal purpose of this recommendation, as I understand it, was to insure that the Government would not enter into inappropriate decrees through lack of awareness of important factual considerations or through serious miscalculation of what would be an

appropriate decree in the particular circumstances involved. Similarly, the recommendation that the Department file a detailed statement with each consent decree was presumably intended to make sure that the Antitrust Division did not enter into consent decrees casually but only after a careful review of all the relevant considerations.

I completely agree with the goals just described, and I believe that the revision of procedures instituted in 1961 has enabled them to be substantially achieved. As you know, when the Government reaches agreement with the antitrust defendant on a consent judgment, the proposed judgment is filed in court with a stipulation which gives the Government an unqualified right to withdraw its consent at any time within 30 days.* At the time when the stipulation and proposed judgment are filed, it is our regular procedure to issue a press release relating to the proposed settlement. The fact that the Government has entered into a consent decree, and the information made available in the press release, is ordinarily given wide circulation not only in newspapers but in antitrust professional trade journals. The information is customarily given particular attention in the trade press serving the industry involved. In addition, we try to follow the practice of sending proposed judgments to know complainants once the proposed judgment has been filed with the court so that their views can be given to us within the 30-day waiting period. Even before a consent decree is agreed upon, interested parties have often communicated their views to the Antitrust Division on issues of relief. Where we have thought it appropriate, we solicited the views of competitors or other affected

* On very rare occasions when circumstances appeared to require it, and then only with personal approval by the Attorney General, the Government has filed a decree without a 30-day waiting period.

parties on the type and nature of relief they deem to be desirable; in some cases, such views have been solicited in the investigatory phase of the case, that is, before a complaint has even been filed. In sum, I believe that affected parties have had ample opportunity to make their views known to us before final adoption of a proposed consent judgment by a district court. Since 1961, when our procedures were revised, there have been several instances in which the 30-day waiting period has been extended in order for us to investigate information brought to our attention or to seek to revise negotiated decrees to take care of problems raised with us by interested private parties. The *Blue Chip Stamp* case, which is still not finally resolved, is the most recent and perhaps the most striking example.

In addition, while we have regularly opposed efforts by private parties to intervene formally in proceedings on proposed decrees, we have regularly acquiesced when private parties have endeavored to file statements or briefs with the district court or have requested the opportunity for oral argument to the court, both of which have become more and more common.

In my opinion, the Antitrust Division's consent decree procedures have clearly created adequate opportunity for objections to be raised, both privately to us or publicly to the courts or otherwise. They have substantially eliminated the danger that the Government would improvidently settle an antitrust case because of incomplete knowledge of the facts or inadequate appreciation of defects in proposed remedies. And I can personally testify that they have compelled the Division to consider carefully all relevant considerations before agreeing to a particular decree. The revised procedures, of course, have not maximized the opportunities for third parties to upset a decree negotiated between the Government and defendants, as our acqui-

escence in formal intervention by such third parties would do. Our procedures have not maximized, as formal intervention would, the opportunities for third parties to impress upon the courts policy conclusions different from what the Division itself has made. But in my view, the case for so broadening the opportunities for third parties to alter the Government's antitrust-enforcement policies is not a persuasive one.

I should like to restate the reasons. In the first place, as you know, use of the consent decree has greatly magnified the scope of antitrust enforcement that can be carried on with any given amount of enforcement resources. Approximately 70% of our civil cases terminate in consent decrees. Consent decrees are negotiated at various stages. On rare occasions they are negotiated in advance of the filing of a complaint; on some occasions agreement is not reached until shortly before trial; and in some other cases, the decree is not negotiated until after trial on the substantive issue of liability. In most instances, decrees are negotiated at some time after the filing of the complaint but well before the Government has fully prepared its case for trial. But in any event, the negotiation of the decree frees enforcement resources for use elsewhere, and the over-all saving from negotiated settlements is enormous.

It is of course to be expected that in many instances a consent decree will fall short of what might possibly be obtained after full litigation on all issues concerning liability and appropriate relief. One cannot expect defendants regularly to agree to the worst that could happen if they lost a fully litigated case on all fronts. Nevertheless, even in those decrees where the Government has settled for less than what might ultimately be obtaned, there is always the offsetting advantage of obtaining relief at once rather than three, four or five years later, and in many cases, the

Government succeeds in obtaining consent to a decree as good as, or better than, what could be probably obtained from full litigation.

The factors which the Government takes into account in considering whether to agree to a particular decree may be briefly set forth. In addition to the scope and effectiveness of the relief that the decree would provide, they include the strength of the case on the law and the facts; the amount of resources that would be tied up in full preparation for trial and in subsequent legal proceedings; the desirability or necessity of obtaining significant relief rapidly; the value of any added increment of relief that full litigation might produce as compared to the value of the alternative enforcement efforts that could be carried out instead; and the effect that consent to a particular decree might have on other cases, present and future, that are or might be arguably similar. These factors obviously cannot be precisely measured; they rarely all point in the same direction. Striking a balance is a matter for judgment in all instances, and the judgment is often one on which not only one but many reasonable men might differ among themselves.

There is unquestioned value, as I have said, in procedures which enable those who differ with our judgment on any particular case to make their views known—privately to us, or publicly to a court. But to let private parties intervene as of right in opposition to a proposed consent decree would threaten to reduce sharply the number of cases that could be disposed of in this way, and in my opinion, would serve no useful purpose because it would have no promise whatsoever of producing more appropriate results. It should be noted at the outset that no intervenor can force a decree on an unwilling party-defendant.

Should the party-defendant decline to go beyond what he has agreed to do in negotiations with the Government, the intervenor can do no more than force on the Government the choice between dismissal of the case or proceeding to full litigation. And the very process of formal intervention, if that is held to carry with it the full rights of the usual litigant to present evidence and to appeal, would threaten to eliminate one of the major motivating factors that leads both the Government and defendants to attempt to work out an appropriate decree, since intervention would force on the Government and defendants at least some of the burdens of litigation that both, for diverse reasons, have sought to avoid.

Moreover, private intervenors are intervening to serve their own particular private interests. In any Government antitrust action involving conduct for which there may be private treble damage liability there will be some potential private plaintiffs who want no consent decree at all; they wish the Government to litigate and obtain an adjudication on the issue of liability in order to take advantage of Section 5 of the Clayton Act. In almost all antitrust cases, there are some private parties who do not want effective antitrust relief because it may damage their own private interests. There are, for example, many private interests who may be moderately or even seriously damaged by an effective divestiture decree in a Section 7 case; distributors, for example, may lose their distribution rights when the divested company falls into the hands of new owners. Finally, there are some would-be intervenors who want the Government to get more in the way of relief than the Government has agreed to accept, but even in those instances, the parties are concerned with only their own particular situation; they are not concerned with, and indeed

are in no position to evaluate, the place which their case has in the overall antitrust enforcement program.

Where the Government has concluded that the added amount of relief which might theoretically be obtained would involve protracted litigation and use of enforcement resources which could be put to much better use elsewhere, the private intervenor would rarely if ever be in a position to second-guess that judgment. Nor would the court to whom such an issue would be put. Indeed that judgment bears all of the hallmarks of a nonjusticiable issue. Thus, it seems to me that decisions of this kind are properly left to the enforcing agency, subject to the checks against mistake of fact, miscalculation of consequences of plain sloppiness that our existing consent judgment procedures provide, and subject of course to the additional check of continuous Executive and Congressional scrutiny.

This brings me to the decision of the Supreme Court in the *El Paso* case. It would of course be wholly inappropriate for me to re-argue the merits of that case. The decision of the Supreme Court must be respected. However, I can say that I do not read that decision as necessarily holding or suggesting that the intervention granted in that case is a precedent for intervention in consent decree proceedings generally. Without going into a full analysis, I note that the Court stressed the fact that *El Paso* involved a Supreme Court mandate which allegedly had not been honored, and I further note that the *El Paso* case on its facts made effective divestiture of much greater concern to those who attempted to intervene than customers ordinarily have in, say, a typical Section 7 case. Consequently, in view of the considerations I have outlined above, I believe it appropriate for us, in the usual situation, to continue to ouppose attempted formal intervention in consent decree proceedings in Government civil antitrust cases.

The second proposal which you cited from the 1959 report of the Committee was that the Department of Justice accompany the filing of a consent decree with

> "a statement that sets forth the facts involved, defendant's position, the meaning of the provisions used in the decree, and the reasons that formed the basis for the Department's acceptance of the particular compromise."

As I have indicated, the Department commonly issues a press release containing at least some information about the proposed decree. The amount of information supplied varies a great deal from case to case. I believe that the proposal to provide a more detailed statement merits serious consideration on our part. It may well be we could and should supply more information than we have been accustomed to do, particularly in explaining the purposes of the decree and the expected impact of the relief obtained.

We deeply appreciate your continued interest in effective enforcement of the antitrust laws.

Sincerely yours,

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Antitrust Division